



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

THE DIRECTOR

Individual Deviation

**In Support of the Office of Management and Budget Acquisition:
Printing of the President's Fiscal Year 2004 Budget**

SUMMARY

Section 1.403 of the Federal Acquisition Regulation (FAR) provides that individual deviations may be authorized by agency heads or their designees. The deviation provided herein will permit the Office of Management and Budget (OMB) to acquire, with the Office of Administration (OA) acting as its contracting agent, printing services required for the publication of all or some portions of the President's FY 2004 Budget using the policies set forth in OMB Memorandum M-02-07, Procurement of Printing and Duplicating through the Government Printing Office (GPO), in lieu of the policies currently set forth in FAR Subpart 8.8 and related provisions at FAR 8.002(b) and FAR 6.302-5.

FINDINGS

1. FAR Subpart 8.8, which addresses the acquisition of printing, currently requires that agencies, including OMB, acquire printing services by or through the GPO. This policy is further implemented at FAR 8.002(b), which reiterates the requirement to procure printing in accordance with Subpart 8.8 and FAR 6.302-5, which provides an exception from the requirements to conduct competition in order to accommodate the mandate to use the GPO.

2. In 1996, the Department of Justice's Office of Legal Counsel (OLC) issued an opinion concluding that the statutes that compel the Executive Branch to utilize GPO constitute an unconstitutional infringement upon Executive Branch powers. *See* Memorandum from Walter Dellinger, Assistant Attorney General, to Emily C. Hewitt, General Counsel, General Services Administration, May 31, 1996. The Justice Department's opinion stated explicitly that the Executive Branch was not bound to follow those statutes. *See id.* The Justice Department recently reaffirmed its 1996 opinion, stating again that Congress' attempt "to vest executive power in a body subject to congressional control . . . is unconstitutional." *See* Memorandum for Adam Greenstone, General Counsel, Office of Administration, Executive Office of the President, October 22, 2002 (attached). The Justice Department's most recent opinion further concluded that the statutes requiring the Executive Branch to utilize GPO are unconstitutional for the additional reason that they violate "the requirement that legislative action must comply

with the procedure laid out in the Constitution: passage by both houses and presentment to the President.” *Id.* at 2.¹ Nonetheless, Executive Branch departments and agencies have continued to treat GPO as a mandatory source because FAR Subpart 8.8 has perpetuated the mandatory source requirement.

3. On May 3, 2002, the Director of OMB issued a policy memorandum (no. M-02-07) setting forth the Executive Branch’s policy with respect to the use of GPO in handling departmental and agency printing and duplicating needs. OMB’s memorandum introduces competition into Executive Branch printing so that the federal government receives the best possible deal when spending taxpayers’ money. The memorandum states that “[t]he time has come for the Executive Branch to liberate its agencies from a monopoly that unfairly penalizes both taxpayers and efficient would-be competitors.”

4. Under current policies, agencies are forced to pay GPO premiums to make decisions for them. Last year, for example, OMB paid GPO \$4,067 in premiums simply to contract out for printing the budget volume of the President’s Budget. The contract value of the work performed for OMB (less the premiums) was \$58,000, i.e., meaning OMB paid a premium of 7 percent. Premiums can range from 7 to 14 percent, which, when combined with processing fees, likely costs the Executive Branch \$50 million to \$70 million per year.

5. OMB’s new policy gives agencies the freedom to conduct their own competitions. In particular, the OMB memorandum allows Executive Branch agencies to choose a printing source based upon the “best quality, cost, and time of delivery.” This freedom will enable agencies to control the cost and quality of the printing services for which they are accountable -- irrespective of whether the winning bid in a competition comes from the private sector, the GPO, or the Executive Branch. The memorandum seeks to have agencies take advantage of the marketplace, emphasizing that taxpayers benefit most from open competition.*

6. Commercial printers have expressed their support to OMB for the opportunities its new policy will provide by allowing them to contract directly with Executive Branch agencies. For example, one company wrote to OMB to welcome the passing of an era marked by the use of outdated specifications, the failure to take advantage of cost saving technology, and reliance on costly distribution channels.

¹ Section 4 of the Continuing Resolution for FY 2003, Public Law 107-240 (H.J. Res. 122) includes a provision essentially requiring that funds be used in accordance with section 501 of title 44. In its October 22, 2002 opinion, OLC has concluded that this language, like other statutory provisions compelling the Executive Branch to use the GPO, is an unconstitutional infringement upon Executive Branch powers and therefore is not binding.

² While GPO anticipates a dramatic shortfall in revenues to cover its operating costs, it reaches this conclusion based on the mistaken assumption that it would receive no Executive Branch work when, in fact, OMB’s policy anticipates continued reliance on GPO when it offers the best combination of quality, cost, and delivery.

7. Agencies are also anticipating the benefits of an open environment. Several agencies specifically advised OMB of inefficiencies perpetuated by forced reliance on a single provider. These inefficiencies include insufficient consideration of quality, excessive costs, delays, inadequate attention to customer satisfaction, and misunderstandings about agency needs that have arisen over the years because GPO's policies generally prevent agencies from communicating directly with its contractors. OMB's new policy is designed to help agencies overcome these shortcomings by giving them the power of choice which will ensure interested sources offer their best products and services.

8. The type of proposed pro-competition reforms set forth in OMB's new policy have a long and broad history of bipartisan support:

- In 1994 President Clinton stated that comprehensive reform of Federal printing could "improve the efficiency and cost-effectiveness of Government printing by maximizing the use of private sector printing capability through open competitive procedures and by limiting Government-owned printing resources to only those necessary to maintain a minimum core capacity." Statement on Signing the Legislative Branch Appropriations Act of 1995, 30 Weekly Comp. Pres. Doc. 1541 (July 22, 1994).
- Alice Rivlin, while serving as Deputy Director of OMB, explained in 1994 that "significant efficiencies, much improved service, and cost savings will be realized by injecting more competition and direct accountability into the area of printing procurement." Statement of Alice Rivlin, Deputy Director, Office of Management and Budget, before the Committee on Rules and Administration, United States Senate (February 3, 1994).
- David M. Walker, Comptroller General of the United States, testified that "GPO's monopoly-like role in providing printing services perpetuates inefficiency because it permits GPO to be insulated from market forces and does not provide incentives to improve operations that will ensure quality services at competitive prices. Federal agencies could be given the authority to make their own printing policies, requiring GPO to compete with private sector printing service providers." Statement of David M. Walker, U.S. Senate Committee on the Budget, February 1, 2000 at 6-7
- Congressman Tom Davis, Chairman of the Subcommittee on Technology and Procurement Policy of the House Committee on Government Reform wrote, on March 12, 2002, that ". . . I am convinced that a permanent Government-wide solution to the GPO monopoly can be achieved by OMB, under its own authority, taking immediate steps to give agencies the greater 'flexibility' that Deputy O'Keefe called for in his testimony. This authority is evident under a May 31, 1996 Legal Opinion of the Department of Justice Office of Legal Counsel. . . ."

9. The Federal Acquisition Regulatory Council (FAR Council) is reviewing a proposed rule to implement OMB memorandum no. M-02-07 in the FAR. The proposed FAR changes would eliminate restrictions that currently mandate use of GPO for printing and related services and substitute in their place provisions that promote competition, thereby freeing agencies to select printing from among a wide array of sources that can demonstrate their ability to meet an agency's needs most efficiently and effectively.

10. The FAR changes would benefit printing contractors small and large. The draft currently under consideration would require agencies across government to make widespread dissemination of proposed contract actions above \$2,500 through Federal Business Opportunities (i.e., "FedBizOpps"), the Executive Branch's one-stop Internet gateway to procurement opportunities. FedBizOpps is arguably the most robust gateway of its kind in the world -- enabling vendors to easily acclimate themselves to the activities of Executive departments and agencies. This ease of access to information (including notices, solicitations, and other related acquisition information) should be especially helpful to small business printers as they capitalize on opportunities to establish new relationships throughout the Executive Branch.

11. OMB is considering the options presented by OMB memorandum no. M-02-07 for the publication of all or a portion of the President's FY 2004 Budget.³ Specifically, OMB, with OA acting as its contracting agent, plans to conduct its own competitive procurement to select a source for printing all or part of the Budget. However, it does not appear that a final FAR rule to authorize Executive Branch competitions for printing will be published in time to accommodate OMB's needs for production of the FY 04 Budget.

³ The President's Budget for FY 2003 consisted of 5 distinct volumes: (1) the Budget, (2) the Appendix, (3) Analytical Perspectives, (4) Historical Tables, and (5) Budget Information for States. There was a sixth volume, Citizens Guide to the Budget, but this volume was, and is likely to again be, published electronically through the Internet. A seventh volume, discussing the results of OMB's review of Program Performance is likely to be included in the FY2004 President's Budget.

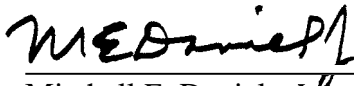
DETERMINATION

Based on the above findings, and the authority of FAR 1.403, the following individual deviation is granted for the acquisition of printing services for the publication of the President's FY 2004 Budget.

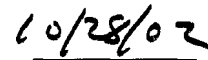
1. Notwithstanding FAR Subpart 8.8, FAR 8.002(b) and FAR 6.302-5, OMB will conduct a competition to select one or more sources to provide printing services for the production of all or part of the President's Budget.

2. OMB will document the competition strategy selected, including the rationale for the scope of the needs competed, the sources permitted to participate in the competition, and the factors (e.g., quality, cost, and delivery) to be considered in the selection process.

Approved by:



Mitchell E. Daniels, Jr.



Date

Attachment